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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET ~~No. 1862~~ 70 - 317

BEN D. LEUTY, *Petitioner,*

—against—

THE STATE OF NEW JERSEY, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: September 27, 1971

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In its opposition to Leuty's petition, New Jersey has misstated the issues in the case; has ignored the identity of legal and factual issues raised by the State and Federal indictments; and has posed irrelevant arguments about the possibility of a Federal retrial.

NEW JERSEY HAS MISSTATED THE ISSUES IN THE CASE

New Jersey maintains that Leuty's petition depends solely upon the Court's willingness to overrule *Bartkus* v. *Illinois*, 359 U. S. 121. (Brief in Opposition, pp. 2-3, 19-20.) This is not so. Leuty's petition to this Court rests on two alternative grounds:

1. The Double Jeopardy Clause forbids the State to force a defendant to trial on a charge of violating a statute

after the Federal Government, under a virtually identical indictment, has tried him for the same alleged violations of the identical statue. By its own terms, this Court's prior decision in *Bartkus* does not govern such a situation.

2. If *Bartkus* were expanded to permit such a retrial, then *Bartkus* should be overruled.

Thus, the continued vitality of *Bartkus* is a question that could but need not be reached in granting Leuty's petition.

New Jersey's discussion of collateral estoppel principles is similarly misplaced. Leuty asserts that his impending State trial will violate the guarantee against *double jeopardy*. He nowhere asks this Court to rule upon the issue of a possible collateral estoppel. Collateral estoppel was raised below as a separate, alternate argument in addition to Leuty's double jeopardy point. (See Leuty's Petition, Appendix B, p. 7a.) Leuty does not raise his collateral estoppel point here. Thus, the State's reference to *Ashe* v. *Swenson*, 397 U. S. 436, is beside the point. (Brief in Opposition, pp. 3-5, 10, 14-15.)

NEW JERSEY ERRS IN ITS ARGUMENT THAT THE FEDERAL AND STATE ACTIONS ARE "CONCEPTIONALLY DISTINCT AND REQUIRE DIFFERENT PROOFS"

A. The Federal and State Actions Are Not "Conceptually Distinct."

Both the Federal statute (18 U. S. C. § 1952) and the State statute (N. J. S. 2A:93-6) have a common target, the punishment of bribery in violation of N. J. S. 2A:93-6. This is clear from the fact that the statutes are conceptually and procedurally identical, since the Federal statute is violated *only if* there is proof of *acts that violate or attempt to violate State law*. This is clear also from the fact that the Federal indictment alleged seven violations or attempted

violations of State law. Those allegations were not surplusage; they were necessary to a valid indictment.* In only one respect, in fact, do the Federal and State statutes differ. The availability of Federal resources for the execution of the State's policy is limited to cases where the accused is alleged to have used interstate facilities. In Leuty's case, the presence of such use was never challenged.

B. The Federal and State Actions Involve the Same Events and Evidence.

New Jersey does not dispute that the Federal prosecutor tried Leuty for violating New Jersey law, nor that the events and evidence that were the subject of the Federal trial will be the subject of the State trial as well. Indeed, New Jersey's own Counter-Statement of the Case reveals that the acts upon which it will rely are identical with those invoked by the Federal Government. (Brief in Opposition, pp. 5-9.) Significantly, the State nowhere suggests one fact or one issue not already aired at the Federal trial.

NEW JERSEY'S ARGUMENT THAT THE TRIAL COURT MUST HAVE AN OPPORTUNITY TO DEVELOP THE FACTUAL ISSUES LACKS MERIT.

As noted above, New Jersey suggests no fact or issue to be determined by the State trial court that has not already been tried out in the Federal arena. The suggestion that the double jeopardy issue must await resolution by

*An examination of Appendix D of Leuty's Petition clinches the point. Each count of the Federal indictment alleged that Leuty's acts were intended to violate N. J. S. 2A:93-6. Each of the substantive counts alleged that Leuty's acts constituted either a violation or an attempted violation of N. J. S. 2A:93-6. Each of the conspiracy counts alleged as the object of the conspiracy the violation of N. J. S. 2A:93-6, and as the overt acts, the violations of N. J. S. 2A:93-6 which were the basis for the substantive counts. (Leuty's Petition pp. 13a, 23a, 24a, 26a, 27a, 28a, 29a, 39a, 41a.)

the State court amounts to the Micawberish hope that at a second trial something new will "turn up" that will enable a State conviction to withstand a subsequent double jeopardy attack. This is precisely the evil the Double Jeopardy Clause was intended to avoid.

WHETHER PETITIONER CAN BE SUBJECTED TO A SECOND FEDERAL TRIAL IS IRRELEVANT.

Whether or not the Federal Government can retry petitioner on any count of the Federal indictment,* no State trial is constitutionally permissible. Any Federal retrial can take place only under the doctrine of "continuing jeopardy." *Price* v. *Georgia,* 398 U. S. 323.** But that justification does not permit a State prosecutor to commence a new case against Leuty.*** The guarantee against double jeopardy has always been, at the very least, a guarantee "against jeopardy in a new and independent case." *Palko* v. *Connecticut,* 302 U. S. 319, 323, overruled on other grounds, *Benton* v. *Maryland,* 395 U. S. 784.

Observance of this rule is particularly appropriate here. Since the filing of Leuty's petition, the Federal prosecutor has secured the return against Leuty of a *second* Federal indictment, identical in all material respects to the first Federal indictment. Not only has Leuty been reindicted on the two counts of conspiring to violate New Jersey law on which he was initially convicted, but he has also been reindicted on the seven substantive violations of New Jersey law of which his first jury acquitted him. To subject a

*Petitioner denies that such a Federal retrial would be lawful.

**In *Price,* the Court held that a defendant who obtained a reversal of his conviction could be retried for the convicted offense. Retrial, the Court said, was not a second jeopardy, but rather, a part of "[a] continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." *Id.* at 326.

***New Jersey's authority, *United States* v. *Ewell,* 383 U. S 116, does not involve a new prosecutor beginning a new case.

citizen, already once indicted and tried, to the ordeal of facing again both a new Federal trial and a new State trial on new indictments for the same alleged violations of the identical statute by the same conduct is to defy the standards of civilized behavior. Neither double jeopardy nor due process should tolerate it.

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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CERTIORARI DENIED N.C.R.